

file

BEFORE THE
STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS

Application of John Faskell for a Permit)	
to Construct a Dam Across an Unnamed)	Case No. 3-LM-93-180 & 181
Creek, Town of Mukwa, Waupaca)	
County, Wisconsin)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

John Faskell applied to the Department of Natural Resources for a permit pursuant to § 31.05, Stats., to construct a dam across an unnamed creek. The proposed project will be located in the Town of Mukwa, Waupaca County, Wisconsin.

The Department of Natural Resources issued a Public Notice which stated that unless written objection was made within thirty days after publication, the Department might issue a decision on the permit without a hearing. The staff of the Lake Michigan District of the Department of Natural Resources objected to the issuance of the proposed permit.

On September 14, 1994, the Department of Natural Resources filed a request for hearing with the Division of Hearings and Appeals. Pursuant to due notice a hearing was held on January 4, 1995, Mark J. Kaiser, Administrative Law Judge, presided.

In accordance with §§ 227.47 and 227.53(1)(c), Stats., the PARTIES to the proceeding are certified as follows:

John Faskell, Applicant
Route 3
New London, Wisconsin 54961-9999

Wisconsin Department of Natural Resources, by

Attorney Marcia Penner
P. O. Box 7921
Madison, Wisconsin 53707-7921

FINDINGS OF FACT

1. John Faskell, Route 3, New London, Wisconsin, completed filing an application in accordance with § 31.05, Stats., with the Department of Natural Resources (Department) on March 29, 1993, for a permit under § 31.06, Stats., to construct a dam across an unnamed creek in the Town of Mukwa, Waupaca County. The Department and the applicant have complied with all procedural requirements of § 31.06, Stats.

2. The proposed dam will be located on an unnamed creek in the NE 1/4 of the NW 1/4 of Section 7, Township 22 North, Range 14 East, Town of Mukwa, Waupaca County. The property through which the unnamed creek flows is owned by John Faskell.

3. The unnamed creek is an intermittent stream. It has a defined bed and bank and is capable of floating a recreational watercraft of the shallowest draft at regularly recurring periods, such as during spring thaw. The unnamed creek is navigable in fact at the location of the proposed dam.

4. The unnamed creek flows in a northwesterly direction into Life Creek. Life Creek, in turn flows in a northerly direction and joins the Little Wolf River. The unnamed creek is bounded on the south by Ostrander Road. A culvert under Ostrander Road also directs water into the unnamed creek. Water churning at the outlet of the culvert under Ostrander Road stirs up sediment which is carried away by the unnamed creek.

5. The proposed dam will consist of an earthen dike measuring 140 feet in length by six feet high with a top width of eight feet. A rock lined spillway will be constructed on the west side of the dam.

6. The proposed dam will create a finger-shaped impoundment approximately .6 acres in size with a maximum depth of three feet. The area where the impoundment will be located is classified as a wooded wetland.

7. The purpose of the proposed dam is for sediment retention. The churning water at the outlet of the culvert under Ostrander Road will be slowed by the proposed dam. The reduced velocity of the water will cause it to deposit most of the sediment in the impoundment and not allow it to be carried downstream into Life Creek or the Little Wolf River. Another purpose of the proposed dam is enhancement of waterfowl habitat. The impoundment will be available for use by waterfowl, particularly ducks.

8. Creation of the impoundment will destroy existing wetland vegetation in the area of the impoundment. Existing wetland vegetation observed in the area include alder and marsh marigolds.

9. Creation of the impoundment may also adversely affect the wildlife habitat of the area. Wildlife using the area include deer, ruffed grouse, woodcock, fur-bearing and other small mammals, song birds, reptiles, amphibians, and invertebrates. The existing wetland is potential habitat for wood turtles, a state threatened species.

10. The natural resources board has a stated policy recognizing the values of wetlands, including biological functions, watershed functions, biological functions and storm and floodwater storage. The policy directs the Department to "give primary consideration to reasonable alternatives, including the alternative of denying requested approval, that avoid adverse impacts on wetlands and that result in the least overall adverse environmental impact." Section NR 1.95, Wis. Adm. Code

11. Sediment retention is a worthwhile goal; however, the record contains no evidence that the existing wetland does not adequately retain sediment stirred up at the culvert under Ostrander Road. Enhancement of waterfowl habitat is also a worthwhile goal; however, the value of wetlands exceeds that of a sediment retention pond which may be used by waterfowl. Waterfowl habitat is relatively common in the area while wetlands are becoming increasingly rare. Creation of waterfowl habitat at the expense of destroying a wetland is not reasonable. If Mr. Faskell is committed to creating additional waterfowl habitat, alternative locations exist where he can do so which will not result in the loss of wetlands or other significant adverse environmental consequences.

12. The proposal to construct a dam which will destroy a wetland by the creation of an impoundment does not satisfy the requirements of Ch. NR 103, Wis Adm. Code.

13. The unnamed creek is spring fed. Constructing the proposed dam and creating an impoundment will likely raise the water temperature of the creek. The increase in water temperature could adversely impact the fish habitat values of the creek downstream from the site of the proposed dam. Additionally constructing the dam could reduce the amount of water available downstream which would adversely impact the ability of the creek to sustain existing plant, animal and insect life.

14. The construction of the proposed dam and impoundment is not in the public interest considering ecological, aesthetic, economic and recreational values.

CONCLUSIONS OF LAW

1. The Department of Natural Resources has authority under §§ 31.02 and 31.05, Stats., to review proposals to construct dams in navigable waters.

2. Section NR 103.08(4)(a)2, Wis. Adm. Code, requires the Department to make a finding that the requirements of Ch. 103, Wis Adm. Code, are not satisfied if a "practicable alternative exists which will not adversely impact wetlands and will not result in other significant adverse environmental consequences."

3. Pursuant to § NR 150.03(8)(f)7.d, Wis. Adm. Code, the project is a type III action. Type III actions do not require the preparation of a formal environmental impact statement.

4. Pursuant to §§ 227.43(1)(b) and 31.06, Stats., the Division of Hearings and Appeals has the authority to hear contested cases related to construction of dams and to issue the following order.

ORDER

IT IS THEREFORE ORDERED that the application of John Faskell to construct a dam across an unnamed creek in the Town of Mukwa is denied.

Dated at Madison, Wisconsin on February 3, 1995.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
5005 University Avenue, Suite 201
Madison, Wisconsin 53705
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By Mark J. Kaiser
MARK J. KAISER
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.